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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSE JACINTO MENDEZ LUNA and WILLAN ORLANDO ORELLANA MENDOZA *individually and on behalf of others similarly situated,*

Plaintiffs,

-against-

234 EAST 4TH STREET RESTAURANT, CORP. (d/b/a SECARA RESTAURANT), ADOLFO TORO, and CHRISTIAN CAICEDO

Defendants.

--X

COMPLAINT

COLLECTIVE ACTION UNDER 29 U.S.C. § 216(b)

ECF Case

Plaintiffs Jose Jacinto Mendez Luna and Willan Orlando Orellana Mendoza, individually and on behalf of others similarly situated (collectively, "Plaintiffs"), by and through their attorneys, Michael Faillace & Associates, P.C., upon their knowledge and belief, and as against 234 East 4th Street Restaurant, Corp. (d/b/a Secara Restaurant) ("Defendant Corporation"), Adolfo Toro, and Christian Caicedo allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are former employees of defendants 234 East 4th Street Restaurant, Corp. (d/b/a Secara Restaurant), Adolfo Toro, and Christian Caicedo (collectively, "Defendants").

2. Defendants owned, operated, or controlled a Cuban restaurant located at 234 East 4th Street, New York, New York 10009 under the name Secara Restaurant.

3. Upon information and belief, individual defendants Adolfo Toro and Christian Caicedo serve or served as owners, managers, principals, or agents of Defendant Corporation and, through this corporate entity, operate or operated the restaurant as a joint or unified enterprise.

4. Plaintiffs were employed as a cook, busboy, bartender, host, book keeper, and waiter. However, Plaintiff Orellana was required to spend a considerable part of his work day performing non-tipped duties, unrelated to his tip work, including but not limited to taking ice to the bar, sweeping and mopping, cleaning the windows, the tables, the bar, and silverware, preparing coffee and tea, taking in and stocking deliveries that would arrive to the restaurant, taking out the garbage, book keeping, and bringing up wine and liquor bottles from the basement to the bar (hereinafter the "non-tipped duties").

5. At all times relevant to this Complaint, Plaintiffs worked for Defendants in excess of 40 hours per week, without appropriate minimum wage and overtime compensation for the hours that they worked.

6. Rather, Defendants failed to maintain accurate recordkeeping of the hours worked, failed to pay Plaintiff Orellana appropriately for any hours worked, either at the straight rate of pay or for any additional overtime premium.

7. Further, Defendants failed to pay Plaintiffs the required “spread of hours” pay for any day in which they worked over 10 hours per day.

8. Defendants employed and accounted for Plaintiff Orellana as a busboy, bartender and waiter in their payroll, but in actuality his duties included a significant amount of time spent performing the non-tipped functions such as those alleged above.

9. Regardless, at all relevant times, Defendants paid Plaintiff Orellana at a rate that was lower than the required tip-credit rate.

10. However, under state law, Defendants were not entitled to take a tip credit because Plaintiff Orellana (and other similarly situated employees’) non-tipped duties exceeded 20% of each workday, or 2 hours per day, whichever was less in each day. (12 N.Y.C.R.R. §146).

11. Upon information and belief, Defendants employed the policy and practice of disguising Plaintiff Orellana’s actual duties in payroll records by designating him as a bartender, busboy and waiter instead of non-tipped employee. This allowed Defendants to avoid paying Plaintiff Orellana at the minimum wage rate and enabled them to pay him at the lower tip-credited rate (which they still failed to do).

12. In addition, Defendants maintained a policy and practice of unlawfully appropriating Plaintiff Orellana’s tips and made unlawful deductions from Plaintiff Orellana’s and other similarly situated employees’ wages.

13. Defendants' conduct extended beyond Plaintiffs to all other similarly situated employees.

14. At all times relevant to this Complaint, Defendants maintained a policy and practice of requiring Plaintiffs and other employees to work in excess of forty (40) hours per week without providing the minimum wage and overtime compensation required by federal and state law and regulations.

15. Plaintiffs now bring this action on behalf of themselves, and other similarly situated individuals, for unpaid minimum and overtime wages pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*. ("FLSA"), and for violations of the N.Y. Labor Law §§ 190 *et seq*. and 650 *et seq.* (the "NYLL"), and the "spread of hours" and overtime wage orders of the New York Commissioner of Labor codified at N.Y. COMP. CODES R. & REGS. Tit. 12, § 146-1.6 (herein the "Spread of Hours Wage Order"), including applicable liquidated damages, interest, attorneys' fees and costs.

16. Plaintiffs seek certification of this action as a collective action on behalf of themselves individually and all other similarly situated employees and former employees of Defendants pursuant to 29 U.S.C. § 216(b).

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and the FLSA, and supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367(a).

18. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) because all, or a substantial portion of, the events or omissions giving rise to the claims occurred in this district,

Defendants maintain their corporate headquarters and offices within this district, and Defendants operate a Cuban restaurant located in this district. Further, Plaintiffs were employed by Defendants in this district.

THE PARTIES

Plaintiffs

19. Plaintiff Jose Jacinto Mendez Luna ("Plaintiff Mendez" or "Mr. Mendez") is an adult individual residing in Queens County, New York. Plaintiff Mendez was employed by Defendants from approximately September 2, 2015 until on or about December 23, 2016.

20. Plaintiff Willan Orlando Orellana Mendoza ("Plaintiff Orellana" or "Mr. Orellana") is an adult individual residing in New York County, New York. Plaintiff Orellana was employed by Defendants from approximately July 2016 until on or about December 24, 2016.

Defendants

21. At all relevant times, Defendants owned, operated, or controlled a Cuban restaurant located at 234 East 4th Street, New York, New York 10009 under the name "Secara Restaurant."

22. Upon information and belief, 234 East 4th Street Restaurant, Corp. (Defendant Corporation) is a domestic corporation organized and existing under the laws of the State of New York. Upon information and belief, it maintained its principal place of business at 234 East 4th Street, New York, New York 10009.

23. Defendant Adolfo Toro is an individual engaging (or who was engaged) in business in this judicial district during the relevant time period. Defendant Adolfo Toro is sued individually in his capacity as owner, officer and/or agent of the Defendant Corporation. Defendant Adolfo Toro possessed operational control over Defendant Corporation, an ownership

interest in Defendant Corporation, or controlled significant functions of Defendant Corporation. He determined the wages and compensation of the employees of Defendants, including Plaintiffs, established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees.

24. Defendant Christian Caicedo is an individual engaging (or who was engaged) in business in this judicial district during the relevant time period. Defendant Christian Caicedo is sued individually in his capacity as owner, officer and/or agent of the Defendant Corporation. Defendant Christian Caicedo possessed operational control over Defendant Corporation, an ownership interest in Defendant Corporation, or controlled significant functions of Defendant Corporation. He determined the wages and compensation of the employees of Defendants, including Plaintiffs, established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees.

FACTUAL ALLEGATIONS

Defendants Constitute Joint Employers

25. Defendants operated a Cuban restaurant which was located in the East Village section of Manhattan in New York City.

26. The individual defendants, Adolfo Toro and Christian Caicedo possessed operational control over Defendant Corporation, possessed ownership interests in Defendant Corporation, and controlled significant functions of Defendant Corporation.

27. Defendants are associated and joint employers, act in the interest of each other with respect to employees, pay employees by the same method, and share control over the employees.

28. Each Defendant possessed substantial control over Plaintiffs' (and other similarly situated employees') working conditions, and over the policies and practices with respect to the employment and compensation of Plaintiffs, and all similarly situated individuals, referred to herein.

29. Defendants jointly employed Plaintiffs (and all similarly situated employees) and are Plaintiffs' (and all similarly situated employees') employers within the meaning of 29 U.S.C. 201 *et seq*. and the NYLL.

30. In the alternative, Defendants constituted a single employer of Plaintiffs and/or similarly situated individuals.

31. Upon information and belief, individual defendants Adolfo Toro and Christian Caicedo operated Defendant Corporation as either an alter ego of themselves and/or failed to operate Defendant Corporation as an entity legally separate and apart from themselves, by among other things:

a. failing to adhere to the corporate formalities necessary to operate Defendant Corporation as a corporation,

b. defectively forming or maintaining the corporate entity of Defendant Corporation, by, amongst other things, failing to hold annual meetings or maintaining appropriate corporate records,

c. transferring assets and debts freely as between all Defendants,

d. operating Defendant Corporation for their own benefit as the sole or majority shareholders,

e. operating Defendant Corporation for their own benefit and maintaining control over it as a closed corporation,

f. intermingling assets and debts of their own with Defendant Corporation,

g. diminishing and/or transferring assets of Defendant Corporation to avoid full liability as necessary to protect their own interests, and

h. other actions evincing a failure to adhere to the corporate form.

32. At all relevant times, Defendants were Plaintiffs' employers within the meaning of the FLSA and New York Labor Law. Defendants had the power to hire and fire Plaintiffs, controlled the terms and conditions of employment, and determined the rate and method of any compensation in exchange for Plaintiffs' services.

33. In each year from 2015 to 2016, Defendants, both separately and jointly, had a gross annual volume of sales of not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated).

34. In addition, upon information and belief, Defendants and/or their enterprise were directly engaged in interstate commerce. As an example, numerous items that were used in the Cuban restaurant on a daily basis were goods produced outside of the State of New York.

Individual Plaintiffs

35. Plaintiffs are former employees of Defendants who were employed as cook, busboy, bartender, host, book keeper and waiter. Plaintiffs seek to represent a class of similarly situated individuals under 29 U.S.C. 216(b).

Plaintiff Jose Jacinto Mendez Luna

36. Plaintiff Mendez was employed by Defendants from approximately September 2, 2015 until on or about December 23, 2016.

37. Defendants employed Plaintiff Mendez as a cook.

38. Plaintiff Mendez regularly handled goods in interstate commerce, such as food and other supplies produced outside the State of New York.

39. Plaintiff Mendez's work duties required neither discretion nor independent judgment.

40. Throughout his employment with Defendants, Plaintiff Mendez regularly worked in excess of 40 hours per week.

41. From approximately September 2, 2015 until on or about February 2016, Plaintiff Mendez worked from approximately 1:30 p.m. until on or about 12:00 a.m., Mondays through Fridays and from approximately 9:30 a.m. until on or about 1:00 a.m. on Saturdays and Sundays (typically 84.5 hours per week).

42. From approximately March 2016 until on or about December 23, 2016, Plaintiff Mendez worked from approximately 3:00 p.m. until on or about 11:00 p.m. Tuesdays through Fridays and from approximately 11:00 a.m. until on or about 12:00 a.m. on Saturdays and Sundays (typically 58 hours per week).

43. Throughout his entire employment with Defendants, Plaintiff Mendez was paid his wages in cash.

44. Throughout his entire employment with Defendants, Plaintiff Mendez was paid a fixed weekly salary of $800.00.

45. However, for a period of four weeks in approximately mid to late 2016, Defendants failed to pay Plaintiff Mendez his weekly wages and thus owe him $3,200.00.

46. Plaintiff Mendez's pay did not vary even when he was required to arrive earlier or work a longer day than his usual schedule.

47. For example, from approximately September 2, 2015 until on or about February 2016, defendants required Plaintiff Mendez to start working 30 minutes prior to his scheduled start time and continue working past his scheduled departure time on numerous occasions, and did not pay him for the additional time they required him to work.

48. Defendants never granted Plaintiff Mendez any break or meal period of any kind.

49. No notifications, either in the form of posted notices or other means, were ever given to Plaintiff Mendez regarding overtime and wages under the FLSA and NYLL.

50. Plaintiff Mendez was not required to keep track of his time, nor to his knowledge did the Defendants utilize any time tracking device such as punch cards, that accurately reflected his actual hours worked.

51. Furthermore, Defendants never provided Plaintiff Mendez with a statement of wages with each payment of wages, as required by NYLL 195(3).

52. Defendants never gave any notice to Plaintiff Mendez, in English and in Spanish (Plaintiff Mendez's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

Plaintiff Willan Orlando Orellana Mendoza

53. Plaintiff Orellana was employed by Defendants from approximately July 2016 until on or about December 24, 2016.

54. Defendants ostensibly employed Plaintiff Orellana as a waiter, bartender, busboy, host, and bookkeeper.

55. However, Plaintiff Orellana was also required to spend a significant portion of his work day performing the non-tipped, non-delivery duties described above.

56. Although Plaintiff Orellana was ostensibly employed as a tipped worker, he spent over 20% of each day performing non-tip work throughout his employment with Defendants.

57. Plaintiff Orellana regularly handled goods in interstate commerce, such as food and other supplies produced outside the State of New York.

58. Plaintiff Orellana's work duties required neither discretion nor independent judgment.

59. Throughout his employment with Defendants, Plaintiff Orellana regularly worked in excess of 40 hours per week.

60. From approximately July 2016 until on or about December 24, 2016, Plaintiff Orellana worked from approximately 2:00 p.m. until on or about 12:00 a.m., Tuesdays through Fridays and from approximately 12:00 p.m. until on or about 12:00 a.m. on Saturdays and Sundays (typically 64 hours per week).

61. Throughout his employment with Defendants, Plaintiff Orellana was paid his wages in a combination of check and cash.

62. Throughout his employment with Defendants, Plaintiff Orellana was paid a fixed salary of $500.00 per week.

63. Plaintiff Orellana's pay did not vary even when he was required to stay later or work a longer day than his usual schedule.

64. In addition, Plaintiff Orellana's weekly paychecks bounced three times and defendants did not pay Plaintiff Orellana his wages from approximately November 12, 2016 until on or about December 24, 2016; thus, defendants failed to pay Plaintiff Orellana approximately $4,800 in weekly paychecks.

65. Defendants never granted Plaintiff Orellana any breaks or meal periods of any length.

66. Defendants never notified Plaintiff Orellana that his tips were being included as an offset for wages.

67. Defendants did not account for these tips in any daily, weekly or other accounting of Plaintiff Orellana's wages.

68. Furthermore, Defendants never provided Plaintiff Orellana with a statement of wages with each payment of wages, as required by NYLL 195(3).

69. No notification, either in the form of posted notices or other means, was ever given to Plaintiff Orellana regarding overtime and wages under the FLSA and NYLL.

70. Defendants never gave any notice to Plaintiff Orellana, in English and in Spanish (Plaintiff Orellana's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

71. Defendants required Plaintiff Orellana to purchase "tools of the trade" with his own funds—including dress pants, a pair of shoes, dress shirts and a suit.

Defendants' General Employment Practices

72. At all times relevant to this Complaint, Defendants maintained a policy and practice of requiring Plaintiffs (and all similarly situated employees) to work in excess of 40 hours a week without paying them appropriate minimum wage, overtime and spread of hours pay as required by federal and state laws.

73. Plaintiffs have been victims of Defendants' common policy and practices which violate their rights under the FLSA and New York Labor Law by, *inter alia*, not paying them the wages they were owed for the hours they worked.

74. Defendants' pay practices resulted in Plaintiffs not receiving payment for all their hours worked, resulting in Plaintiffs' effective rate of pay falling below the required minimum wage rate.

75. Defendants habitually required Plaintiffs to work additional hours beyond their regular shifts but did not provide them with any additional compensation.

76. Defendants required Plaintiff Orellana to perform several non-tip-related tasks for over 20% of each work day, in addition to his primary role as a tipped employee.

77. Plaintiff Orellana was employed ostensibly as a tipped employee, although his actual duties included much greater time spent in non-tipped functions.

78. Plaintiff Orellana was not even paid at the required lower tip-credited rate by Defendants, however, under state law Defendants were not entitled to a tip credit because Plaintiff Orellana's non-tipped duties exceeded 20% of each workday (or 2 hours a day, whichever was less) (12 N.Y.C.R.R. § 146).

79. New York State regulations provide that an employee cannot be classified as a tipped employee "on any day... in which he has been assigned to work in an occupation in which tips are not customarily received." (12 N.Y.C.R.R. §§137-3.3 and 137-3.4). Similarly, under federal regulation 29 C.F.R. §531.56(e), an employer may not take a tip credit for any employee time if that time is devoted to a non-tipped occupation.

80. Plaintiff Orellana's duties were not incidental to his occupation as a tipped employee, but instead constituted entirely unrelated occupations with duties such as those outlined above. While performing these duties, Plaintiff Orellana did not receive tips; therefore, they constituted non-tipped occupations, and Defendants could not lawfully take a tip credit for any of the hours that Plaintiff Orellana worked in these roles.

81. In violation of federal and state law as codified above, Defendants classified Plaintiff Orellana as a tipped employee but did not even pay him at the tip-credited rate when they should have classified him as a non-tipped employee and paid him at the minimum wage rate.

82. Under the FLSA and NYLL, in order to be eligible for a "tip credit," employers of tipped employees must either allow employees to keep all the tips that they receive, or forgo the tip credit and pay them the full hourly minimum wage.

83. In addition, defendants failed to inform Plaintiff Orellana and other employees who receive tips that Defendants intended to take a deduction against their earned wages for tip income, as required by the NYLL before any deduction may be taken.

84. Defendants failed to inform Plaintiff Orellana that his tips were being credited towards the payment of the minimum wage.

85. Defendants failed to maintain a record of tips earned by Plaintiff Orellana for the deliveries he made to customers.

86. Plaintiff Mendez was paid his wages in cash and Plaintiff Orellana was paid his wages in a combination of check and cash.

87. Defendants willfully disregarded and purposefully evaded recordkeeping requirements of the Fair Labor Standards Act and New York Labor Law by failing to maintain accurate and complete timesheets and payroll records.

88. Upon information and belief, these practices by Defendants were done willfully to disguise the actual number of hours Plaintiffs (and similarly situated individuals) worked, and to avoid paying Plaintiffs properly for their full hours worked.

89. Defendants engaged in their unlawful conduct pursuant to a corporate policy of minimizing labor costs and denying employees compensation by knowingly violating the FLSA and NYLL.

90. Defendants' unlawful conduct was intentional, willful, in bad faith, and caused significant damages to Plaintiffs and other similarly situated current and former tipped workers.

91. Defendants failed to post at the workplace, or otherwise provide to employees, the required postings or notices to employees regarding the applicable wage and hour requirements of the FLSA and NYLL.

92. Defendants failed to provide Plaintiffs and other employees with wage statements at the time of their payment of wages, containing: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked; and the number of overtime hours worked, as required by NYLL §195(3).

93. Defendants failed to provide Plaintiffs and other employees, at the time of hiring and on or before February 1 of each subsequent year, a statement in English and the employees' primary language, containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer, as required by New York Labor Law §195(1).

FLSA COLLECTIVE ACTION CLAIMS

94. Plaintiffs bring their FLSA minimum wage, overtime, and liquidated damages claims as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all similarly situated persons who are or were employed by Defendants on or after the date that is three years before the filing of this Complaint (the "FLSA Class Period"), as employees of Defendants (the "FLSA Class").

95. At all relevant times, Plaintiffs, and other members of the FLSA Class who are and/or have been similarly situated, have had substantially similar job requirements and pay provisions.

96. At all relevant times, Plaintiffs, and other members of the FLSA Class who are and/or have been similarly situated, have been subject to Defendants' common practices, policies, programs, procedures, protocols and plans of willfully failing and refusing to pay them at the minimum wage and overtime at a one and one-half times their regular rates for work in excess of forty (40) hours per workweek.

97. At all relevant times, Plaintiffs, and other members of the FLSA Class who are and/or have been similarly situated, have been subject to Defendants' willful failure to keep records required by the FLSA.

98. The claims of Plaintiffs stated herein are similar to those of the other employees.

FIRST CAUSE OF ACTION
(VIOLATION OF THE MINIMUM WAGE PROVISIONS OF THE FLSA)

99. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

100. At all times relevant to this action, Defendants were Plaintiffs' employers within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(d). Defendants had the power to hire and fire Plaintiffs, controlled the terms and conditions of employment, and determined the rate and method of any compensation in exchange for their employment.

101. At all times relevant to this action, Defendants were engaged in commerce or in an industry or activity affecting commerce.

102. Defendants constitute an enterprise within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203 (r-s).

103. In violation of 29 U.S.C. § 206(a), Defendants failed to pay Plaintiffs at the applicable minimum hourly rate.

104. Defendants' failure to pay Plaintiffs at the applicable minimum hourly rate was willful within the meaning of 29 U.S.C. § 255(a).

105. Plaintiffs were damaged in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA)

106. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

107. Defendants, in violation of 29 U.S.C. § 207(a)(1), failed to pay Plaintiffs overtime compensation at a rate of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a work week.

108. Defendants' failure to pay Plaintiffs, and the putative FLSA Class members, overtime compensation was willful within the meaning of 29 U.S.C. § 255(a).

109. Plaintiffs were damaged in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(VIOLATION OF THE NEW YORK MINIMUM WAGE ACT)

110. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

111. At all times relevant to this action, Defendants were Plaintiffs' employers within the meaning of the N.Y. Lab. Law §§ 2 and 651. Defendants had the power to hire and fire Plaintiffs, controlled their terms and conditions of employment, and determined the rates and methods of any compensation in exchange for their employment.

112. Defendants, in violation of NYLL § 652(1) and the supporting regulations of the New York State Department of Labor, paid Plaintiffs less than the minimum wage.

113. Defendants' failure to pay Plaintiffs the minimum wage was willful within the meaning of N.Y. Lab. Law § 663.

114. Plaintiffs were damaged in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
(VIOLATION OF THE OVERTIME PROVISIONS OF THE NEW YORK STATE LABOR LAW)

115. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

116. Defendants, in violation of N.Y. Lab. Law § 190 *et seq*., and supporting regulations of the New York State Department of Labor, failed to pay Plaintiffs overtime

compensation at rates of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a work week.

117. Defendants failed to pay Plaintiffs in a timely fashion, as required by Article 6 of the New York Labor Law.

118. Defendants' failure to pay Plaintiffs overtime compensation was willful within the meaning of N.Y. Lab. Law § 663.

119. Plaintiffs were damaged in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(VIOLATION OF THE SPREAD OF HOURS WAGE ORDER OF THE NEW YORK COMMISSIONER OF LABOR)

120. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

121. Defendants failed to pay Plaintiffs one additional hour's pay at the basic minimum wage rate before allowances for each day Plaintiffs' spread of hours exceeded ten hours in violation of New York Lab. Law §§ 190 *et seq*. and 650 *et seq*. and the wage order of the New York Commissioner of Labor codified at N.Y. COMP. CODES R. & REGS. Tit. 12, § 146-1.6.

122. Defendants' failure to pay Plaintiffs an additional hour's pay for each day Plaintiffs' spread of hours exceeded ten hours was willful within the meaning of New York Lab. Law § 663.

123. Plaintiffs were damaged in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(VIOLATION OF THE NOTICE AND RECORDKEEPING REQUIREMENTS OF THE NEW YORK LABOR LAW)

124. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

125. Defendants failed to provide Plaintiffs with a written notice, in English and in

Spanish (Plaintiffs' primary language), containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer, as required by NYLL §195(1).

126. Defendants are liable to each Plaintiff in the amount of $5,000, together with costs and attorneys' fees.

SEVENTH CAUSE OF ACTION
(VIOLATION OF THE WAGE STATEMENT PROVISIONS OF THE NEW YORK LABOR LAW)

127. Plaintiffs repeat and reallege all paragraphs above as though set forth fully herein.

128. With each payment of wages, Defendants failed to provide Plaintiffs with a statement listing each the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked; and the number of overtime hours worked, as required by NYLL 195(3).

129. Defendants are liable to each Plaintiff in the amount of $5,000, together with costs and attorneys' fees.

EIGHTH CAUSE OF ACTION
(RECOVERY OF EQUIPMENT COSTS)

130. Plaintiffs repeat and reallege all paragraphs above as though set forth fully herein.

131. Defendants required Plaintiffs to pay, without reimbursement, the costs and expenses for purchasing and maintaining equipment and "tools of the trade" required to perform their jobs, such as dress shoes, further reducing their wages in violation of the FLSA and NYLL. 29 U.S.C. § 206(a); 29 C.F.R. § 531.35; N.Y. Lab. Law §§ 193 and 198-b.

132. Plaintiffs were damaged in an amount to be determined at trial.

NINTH CAUSE OF ACTION
(UNLAWFUL DEDUCTIONS FROM TIPS IN VIOLATION OF THE NEW YORK LABOR LAW)

133. Plaintiff Orellana repeats and realleges all paragraphs above as though set forth

fully herein.

134. Defendants unlawfully and without permission from Plaintiff Orellana misappropriated and withheld gratuities paid by customers which should have been retained by Plaintiff Orellana.

135. Defendants' action violated NYLL §196-d.

136. Defendants are liable to Plaintiff Orellana in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants by:

(a) Designating this action as a collective action and authorizing prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all putative class members apprising them of the pendency of this action, and permitting them to promptly file consents to be Plaintiffs in the FLSA claims in this action;

(b) Declaring that Defendants violated the minimum wage provisions of, and associated rules and regulations under, the FLSA as to Plaintiffs (including the prospective collective class members);

(c) Declaring that Defendants violated the overtime wage provisions of, and associated rules and regulations under, the FLSA as to Plaintiffs (including the prospective collective class members);

(d) Declaring that Defendants violated the recordkeeping requirements of, and associated rules and regulations under, the FLSA with respect to Plaintiffs' (and the prospective collective class members') compensation, hours, wages, and any deductions or credits taken against wages;

(e) Declaring that Defendants' violation of the provisions of the FLSA were willful as to Plaintiffs (including the prospective collective class members);

(f) Awarding Plaintiffs (including the prospective collective class members) damages for the amount of unpaid minimum and overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable;

(g) Awarding Plaintiffs (including the prospective collective class members) liquidated damages in an amount equal to 100% of their damages for the amount of unpaid minimum and overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable pursuant to 29 U.S.C. § 216(b);

(h) Declaring that Defendants violated the minimum wage provisions of, and rules and orders promulgated under, the NYLL as to Plaintiffs;

(i) Declaring that Defendants violated the overtime wage provisions of, and rules and orders promulgated under, the NYLL as to Plaintiffs;

(j) Declaring that Defendants violated the Spread of Hours Wage Order of the New York Commission of Labor as to Plaintiffs;

(k) Declaring that Defendants violated the notice and recordkeeping requirements of the NYLL with respect to Plaintiffs' compensation, hours, wages and any deductions or credits taken against wages;

(l) Declaring that Defendants' violations of the New York Labor Law and Spread of Hours Wage Order were willful as to Plaintiffs;

(m) Declaring that Defendants failed to pay Plaintiffs in a timely fashion;

(n) Awarding Plaintiffs damages for the amount of unpaid minimum and overtime wages, and for any improper deductions or credits taken against wages, as well as awarding spread of hours pay under the NYLL, as applicable;

(o) Awarding Plaintiffs damages for Defendants' violation of the NYLL notice and recordkeeping provisions, pursuant to NYLL §§198(1-b), 198(1-d);

(p) Awarding Plaintiffs liquidated damages in an amount equal to one hundred percent (100%) of the total amount of minimum wage, spread of hours pay, and overtime compensation shown to be owed pursuant to NYLL § 663 as applicable; and liquidated damages pursuant to NYLL § 198(3);

(q) Awarding Plaintiffs (including the prospective collective class members) pre-judgment and post-judgment interest as applicable;

(r) Awarding Plaintiffs (including the prospective collective class members) the expenses incurred in this action, including costs and attorneys' fees;

(s) Providing that if any amounts remain unpaid upon the expiration of ninety days following issuance of judgment, or ninety days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of judgment shall automatically increase by fifteen percent, as required by NYLL § 198(4); and

(t) All such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues triable by a jury.

Dated: New York, New York
April 28, 2017

MICHAEL FAILLACE & ASSOCIATES, P.C.

By: /s/ Michael Faillace

Michael Faillace [MF-8436]
MICHAEL FAILLACE & ASSOCIATES, P.C.
Michael A. Faillace [MF-8436]
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Faillace@employmentcompliance.com

January 30, 2017

BY HAND

TO: Clerk of Court,

I hereby consent to join this lawsuit as a party plaintiff.
(Yo, por medio de este documento, doy mi consentimiento para formar parte de la demanda como uno de los demandantes.)

Name / Nombre: **Jose Jacinto Mendez Luna**

Legal Representative / Abogado: Michael Faillace & Associates, P.C.

Signature / Firma: ______________________

Date / Fecha: 30 de enero de 2017

Michael Faillace & Associates, P.C.

Employment and Litigation Attorneys

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New York, New York 10165

Telephone: (212) 317-1200
Facsimile: (212) 317-1620

Faillace@employmentcompliance.com

January 30, 2017

BY HAND

TO: Clerk of Court,

I hereby consent to join this lawsuit as a party plaintiff.
(Yo, por medio de este documento, doy mi consentimiento para formar parte de la demanda como uno de los demandantes.)

Name / Nombre: Willan Orlando Orellana Mendoza

Legal Representative / Abogado: Michael Faillace & Associates, P.C.

Signature / Firma: ____________________

Date / Fecha: 30 de enero de 2017